Yet the Commission made no finding as to the price which American Louisiana and its affiliates will be required to charge in order to recover their costs. Those costs include "producers' prices, as shown in their contracts, which are among the highest, if not the highest, known to this Commission."[7] The minimum rate proposed by American Louisiana is about 80% higher than the cost of existing supplies to Michigan Consolidated and the number of potential customers will unquestionably be severely limited by the price which will have to be charged. It is therefore abundantly clear that the abstract volume which could be disposed of on the basis of present rates in the area, cannot be used interchangeably with the market which will actually be available.

No one disputes that the existence *vel non* of sufficient market is critical so far as Panhandle's aggrieved status is concerned. Intervenors' willingness to assume its existence in the face of the petition and respondent's attempt to prove it by evidence *dehors* the record demonstrates the point here made. But neither can obscure the fact that the court below had no evidence in this case before it; that the Commission did take evidence on the sufficiency of the market and made findings thereon; that the prior records in no way support the authorization of 300,000 Mcf of gas to the market area involved; and that in the absence of substantial evidence supporting such an authorization the Commission's order is arbitrary.

Respondent and intervenors play a game combining the elements of tag and blind man's buff. As "it", the Court must try to catch a market which it is often assured exists but cannot find in anything shown to it. The unfairness of this game to both the Court and to the petitioner is well illustrated in Respondent's Brief[8] where, after going to great lengths to convince this Court that the court below

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[7] App. 38.

[8] Respondent's Brief in Opposition, p. 19, n. 13.

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was "clearly justified in bringing to bear its experience and on that basis to recognize the crying demand for natural gas in this area", the respondent states "*The evidence in the administrative record fully supports this* [sufficiency of market] *conclusion.*" (Emphasis supplied.) Thus, not only is the Court asked to accept an unsupported statement of the intervenors, previous cases not at all germane to this one, and the "experience" of the court below, but also it is assured that the administrative record in this case supports everybody—except the petitioner, whose contrary allegations in this regard were legally admitted by motions to dismiss in the court below.

II.

To suggest, as does the respondent,[9] that Panhandle has not made sufficient averments that no unsatisfied demand exists is hardly fair. There can be no doubt that Panhandle's petition challenges the sufficiency of the market to absorb the new volumes. To require Panhandle at this stage of a proceeding for review to prove "that *no* unsatisfied demand exists" (emphasis supplied) has the same effect as allowing a court to rubber stamp a Commission finding in order to bar review. No petitioner could sustain that burden; and, to make an averment to that effect would amount to pure conjecture. The question is not whether there is any additional market but rather the sufficiency of such market. As a party whose interests are involved in a case before the Commission, Panhandle is entitled to require the Commission to make findings based on substantial evidence; and whether its allegations on review are cast in positive or negative terms is of small moment. If there is no substantial evidence supporting the *sufficiency* of a market insofar as a certificate of convenience and necessity is concerned, the market is *insufficient*. The Commission cannot shift to a review petitioner the responsi-

[9] Respondent's Brief in Opposition, p. 18.

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bility for negating the facts which the applicant is required to prove and the Commission is required to find.

Quite apart from their obvious lack of heart to contest the legal arguments advanced by Panhandle and their willingness to assume favorable answers to the underlying market question, the respondent and the intervenors attempt to rewrite the review statutes. It is asserted[10] that Congress *limited* judicial review of Commission orders by the aggrieved party statutes. To the contrary, it seems clear that this is definitely not the case. As is shown in the petition[11] this Court and the lower courts have construed these statutes as broadening the right to obtain review. Even consumers are now held to be aggrieved parties.

Virtually all the cases cited for the proposition that Panhandle's allegations in the petition for review were insufficient were decided prior to *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, and are distinguishable on that ground. Review of these cases would serve little purpose for they were decided in a climate of uncertainty at a time when the problem of who was an aggrieved party was thoroughly confused with the question of whether the party seeking review had specifically alleged errors which interfered with a legally protected interest of his own. See *Great Western Broadcasting Ass'n* v. *Federal Communications Commission*, D. C. Cir., 94 F. 2d 244, 248. In *Reade* v. *Ewing*, 2d Cir., 205 F. 2d 630, 631, 632, where the petitioner was held to have standing as a consumer to obtain review, it was simply alleged that:

> " . . . your petitioner and the members of his family are consumers and prospective consumers of oleomargarine and the inclusion of any harmful ingredient therein which will make or which may make the oleo-

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[10] Respondent's Brief in Opposition, p. 13; American Louisiana et al., Brief in Opposition, p. 7.

[11] Petition for Writ of Certiorari, pp. 11-17.

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> margarine unwholesome and detrimental to the health of a human being, will adversely affect and harm petitioner and the members of his family."

The basis of his consumer allegation was stated by the court to be that the agency order was "not supported by sufficient evidence to show that it 'will promote honestly [sic] and fair dealing in the interest of consumers.' "

Even though the court found against the petitioner on the merits, it upheld the petitioner's standing to obtain review as a consumer and said:

> "... Congress, by authorizing certain persons within a described class—here those 'adversely affected'—to bring actions to restrain such officers from transcending their statutory authority, validly creates a class of 'private Attorney Generals' to vindicate the right of the United States against its wrongdoing officer."

Respondent also asserts that Panhandle's allegations that there was no substantial evidence of the adequacy of the markets is not an allegation that the markets are insufficient. Respondent does concede, however, that these allegations are to be considered by the Court.[12] Allegations as to absence of evidence to support the existence of a market cannot be turned into proof that it does exist; nor, can Panhandle's allegations be properly or fairly construed in any way other than that the market is not sufficient.

III.

Intervenors and respondent suggest that Panhandle's grievance is speculative and insubstantial, and that it cannot be ascertained until the separate allocation proceeding as between the customers of American Louisiana, Michigan-Wisconsin and Michigan Consolidated is concluded.[13] How-

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[12] Respondent's Brief in Opposition, p. 15.

[13] Respondent's Brief in Opposition, p. 18; American Louisiana et al., Brief in Opposition, p. 14.

ever, the Commission has authorized delivery of 300,000 Mcf of gas to a market Panhandle serves and which Panhandle says is insufficient to absorb the additional volumes of 200,000 Mcf proposed to be delivered to Michigan Consolidated at Detroit.

Greenville Television Co. v. *Federal Communications Commission*, No. 12,356, D. C. Cir., decided Mar. 24, 1955, is apropos. There the court said:

> "... Even the grant of a new license does not automatically take advertising revenue away from existing licensees, but only *creates a situation* in which the new licensee may be able to get the revenue by private negotiation, yet existing licensees are 'adversely affected' and 'parties in interest.'" (Emphasis supplied.)

Thus, the mere fact that the Commission's order is said not to *per se* injure Panhandle is unimportant. The order creates the situation in which Panhandle's interests are likely to be diminished. See to the same effect, *Metropolitan Television Company* v. *United States*, No. 12,192, D. C. Cir., decided April 14, 1955.

The short of the matter is that no further hearing is required to determine the impact of the new gas on the market. The allocation question which has been held open relates primarily to the relative needs of the various customers of Michigan Wisconsin. When such proceedings are held, after the construction of the pipe line, Panhandle will certainly not be afforded an opportunity to question the over-all need for the 300,000 Mcf per day immediately to be dumped on the market. In the circumstances, Panhandle's attempt to obtain review is not premature or speculative. The Commission has determined the sufficiency of the market to its satisfaction and it cannot be expected to go over that ground again in an allocation proceeding. Even if permitted to participate in the allocation proceeding, which will certainly be resisted by the applicants on

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the basis of the holding of the court below,[14] no one would suggest that Panhandle could obtain review of this present order under the guise of reviewing a later allocation proceeding.

There is nothing insubstantial about the interest of Panhandle in this case. It has millions of dollars tied up in pipe lines to the area from which it is about to be eliminated as a competitor. The Commission has found that Panhandle had a sufficient interest to intervene and that is a fact that cannot be gainsaid. As this Court said in *Baltimore & Ohio R. Co.* v. *United States*, 264 U. S. 258,

> "... the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. ... The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest."

Respondent and intervenors seek to create the impression that although the Commission no longer has any jurisdiction over Michigan Consolidated, Panhandle might attempt to induce the Commission through some undefined powers over American Louisiana and Michigan Wisconsin, indirectly to prevent Michigan Consolidated from eliminating purchases from Panhandle. Significantly, the intervenors have not denied, as they well might have, that it is their intention to discontinue taking Panhandle gas. In any event, the petition for certiorari points out that Michigan Consolidated is no longer subject to the jurisdiction of the Federal Power Commission, to its orders or to its rules. Accordingly, the fact that the Federal Power Commission has "complete control over American Louisiana's operations" has no relation to the question whether Michigan Consolidated may be required to continue taking gas from

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[14] On the basis of the non-aggrieved status holding of the court below, the Commission has already excluded Panhandle from the producers' certificate proceeding resulting in a determination of the underlying issue of adequacy of gas supply for this project. (Order of April 18, 1955 in FPC Docket Nos. G-6067 et al.)

Panhandle. The suggestion by intervenors that until further proceedings there is no possibility of American Louisiana displacing any of Panhandle's sales to Michigan Consolidated is meaningless on its face when, as is the case, it is coupled with the assertion that should the situation arise, Panhandle "can obtain full protection of its rights from the Commission, which has ample authority to deal with such matters."[15] The fact is that the Commission has already made its finding as to additional market, issued a certificate to American Louisiana, and made no provision whatsoever to protect Panhandle. In any event, to require Panhandle to rely on the Commission's future good offices as a substitute for the review provided by statute would create a dangerous precedent.

American Louisiana accuses Panhandle of "obfuscation" because of references made to the direct sale market.[16] It is noteworthy that there is no denial of competition in this respect. Moreover, Panhandle has sought authorization from the state regulatory body, and the only opposition voiced has been Michigan Consolidated's. The nature of its opposition is well illustrated by the following quotation from the Bill of Complaint recently filed in the Michigan court:[17]

> "The availability of *this large additional supply of natural gas* to Michigan Consolidated upon the construction of the pipe line *materially affects* the issues in the McLouth procedings [sic] and should be considered by the defendant in reaching a determination on Panhandle's application."

Not only did Michigan Consolidated base its Complaint upon the American Louisiana project, but also in its brief, filed with the Michigan court on February 25, 1955, Mich-

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[15] American Louisiana et al., Brief in Opposition, pp. 14-15; see also, Respondent's Brief in Opposition, pp. 20-21.

[16] American Louisiana et al., Brief in Opposition, p. 12, n. 11; Respondent's Brief in Opposition, p. 20.

[17] App. 69.

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igan Consolidated stated its position even more categorically, as follows:[18]

> "The evidence received by the Defendant Commission showed that there was then pending before the Federal Power Commission a proceeding for the issuance of a certificate of convenience and necessity for the construction of a new pipe line to transport natural gas from the natural gas fields of Louisiana to Detroit and that Michigan Consolidated had entered into a contract with the corporation which would own and operate such pipe line for the delivery of approximately 200,000,000 cubic feet of gas per day to Michigan Consolidated at Detroit. It also showed that *the receipt of such new supply of gas would enable Michigan Consolidated to fully meet all of the natural gas requirements of customers located in its market areas, including such customers as McLouth Steel Corporation.* The 'new evidence' which Michigan Consolidated seeks to introduce in said proceedings includes evidence to show that, on October 1, 1954, the Federal Power Commission entered an order for the issuance of a certificate of convenience and necessity for the construction of such new pipe line." (Emphasis supplied.)

In the end, the respondent and intervenors are seeking to thwart review of a case in which the Commission has put the cart before the horse by concluding that the pipe line can be built and is only now attempting to take the required steps to justify this conclusion. Cf. footnote 8a, Respondent's Brief in Opposition, p. 10.

Despite this, all join in asserting that Panhandle didn't make the proper allegations of "economic injury" etc. This means that a person's status as an aggrieved party depends upon the mouthing of a ritualistic rubric which includes magic words and doesn't mean anything, whereas the petition, answer and petition for rehearing filed by Panhandle contain in the aggregate every single allegation which is said to be necessary.

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[18] App. 69.

In effect, what both respondent and intervenors have said is simply that the court below was justified in holding Panhandle not aggrieved because upon ultimate review of the record it would have had to sustain the Commission's order. Without the record in question before that court or this, what more novel, convenient or dangerous test of the *right* of review could there be?

CONCLUSION

This is not a case which depends primarily upon the particular facts as suggested by respondent. As stated in the petition, if the decision in this case stands, the review of any Commission order granting a certificate of convenience and necessity could be defeated by the simple expedient of adopting the findings of the Commission and concluding, without a record, that the party seeking review is not aggrieved. Moreover, the decision below conflicts with decisions of this Court and those of other circuits, and should be reviewed by the Court.

Accordingly, Panhandle respectfully urges this Court to grant its petition for certiorari.

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